

ECKERT SEAMANS CHERIN & MELLOTT, LLC
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Attorneys for Plaintiff Cool Gear International, LLC

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

COOL GEAR INTERNATIONAL, LLC

Plaintiff,

v.

UNCLE JERRY'S T's of NJ, INC.

Defendant.

Civil Action No. _____

**DOCUMENT FILED
ELECTRONICALLY**

COMPLAINT FOR TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION

Cool Gear International, LLC brings this action for unfair competition in the nature of trademark infringement and trade dress infringement arising under the Trademark Act of 1946, 15 U.S.C. §§ 1051 *et seq.* (2004) ("Lanham Act") against Uncle Jerry's T's of NJ, Inc.

1. Cool Gear International, LLC ("Cool Gear" or "Plaintiff") is a limited liability company organized and existing under the laws of Delaware, located and doing business at 10 Cordage Park Circle, Suite 212, Plymouth, Massachusetts 02360.

2. Defendant, Uncle Jerry's T's of NJ, Inc., ("Uncle Jerry's" or "Defendant") is a corporation organized and existing under the laws of New Jersey, located and doing business at 265 Willow Brook Road, Unit 1 Freehold, New Jersey 07728.

3. This is an action for federal unfair competition in the nature of trademark infringement and trade dress infringement arising under the *Lanham Act*, 15 U.S.C. §§ 1051, *et seq.*

4. This Court has subject matter jurisdiction of this action pursuant to 15 U.S.C. § 1121, and 28 U.S.C. §§ 1331 and 1338.

5. This Court has personal jurisdiction over Defendant because Defendant does business and has committed acts of unfair competition in this District and elsewhere in commerce.

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391.

7. Cool Gear is and has been engaged in the design, manufacture and sale of a wide variety of plastic containers for household use, including plastic food storage containers, and has built a successful business in connection therewith.

8. The nature and extent of Cool Gear's line of plastic food storage containers can be seen at its website, www.coolgearinc.com.

9. Cool Gear designed and developed a plastic food storage container for household use having a distinctive and arbitrary trade dress comprised of a distinctive truncated conical configuration with a slightly flared waist (the "Cool Gear Trade Dress") and sold under Cool Gear's CEREAL ON THE GO mark. (the "Cool Gear CEREAL ON THE GO Container"). The Cool Gear Trade Dress serves to identify the Cool Gear CEREAL ON THE GO Container and to identify it as a product of Cool Gear. See Cool Gear CEREAL ON THE GO Container in attached **Exhibit A**.

10. Since at least as early as May 12, 2005, Cool Gear has continuously, consistently and substantially exclusively used in commerce its CEREAL ON THE GO mark for plastic food storage containers for household use.

11. Since at least as early as May 12, 2005, Cool Gear has continuously, consistently and substantially exclusively used in commerce the Cool Gear Trade Dress for plastic food storage containers for household use.

12. Since at least as early as May 12, 2005, Cool Gear has extensively and continuously advertised, promoted and sold its Cool Gear CEREAL ON THE GO Container with the Cool Gear Trade Dress and under the CEREAL ON THE GO mark to the relevant public and trade and through all appropriate channels of trade in commerce, including e-commerce and promotional product promotions, with the result that Cool Gear's customers and the relevant public and trade have come to know and recognize the Cool Gear CEREAL ON THE GO Container with the Cool Gear Trade Dress and Cool Gear's CEREAL ON THE GO mark and associate the same with Cool Gear and Cool Gear's plastic food storage containers for household use.

13. Cool Gear has built extensive goodwill in connection with the Cool Gear CEREAL ON THE GO Container with the Cool Gear Trade Dress sold under the CEREAL ON THE GO mark and the Cool Gear Trade Dress and the CEREAL ON THE GO mark are readily recognized by the relevant public.

14. The Cool Gear CEREAL ON THE GO Container, using the Cool Gear Trade Dress, and sold under the CEREAL ON THE GO mark, has consistently ranked among the best selling products in its product category.

15. Cool Gear's CEREAL ON THE GO mark is distinctive as applied to the products Cool Gear sells under such mark.

16. The Cool Gear Trade Dress has acquired distinctiveness and commercial strength as an indicium of origin with Cool Gear based on the distinctiveness of the design, the promotion of the Cool Gear CEREAL ON THE GO Container, commercial success and widespread acceptance, *inter alia*.

17. The Cool Gear Trade Dress is non-functional.

18. Uncle Jerry's distributes a plastic food storage container for cereal and milk (the "On-The-Go Container") which it sells and promotes using the name ON-THE-GO CEREAL CUP and which has a configuration comprised of a truncated conical shape with a slightly flared waist as depicted in attached **Exhibit A** which shows such container.

19. Uncle Jerry's' trade dress is substantially visually identical to the Cool Gear Trade Dress as used for the Cool Gear CEREAL ON THE GO Container.

20. Uncle Jerry's commenced distribution of its On-The-Go Container under the name ON-THE-GO CEREAL CUP subsequent to the first use by Cool Gear of its CEREAL ON THE GO mark and the Cool Gear Trade Dress for the Cool Gear CEREAL ON THE GO Container.

21. Uncle Jerry's has used, advertised, promoted and offered for sale its On-The-Go Container using the name ON-THE-GO CEREAL CUP to the relevant public and trade through trade channels that overlap the trade channels that Cool Gear uses to distribute the Cool Gear CEREAL ON THE GO Container with the Cool Gear Trade Dress sold under the CEREAL ON THE GO mark.

22. On March 12, 2013, counsel for Cool Gear wrote to Uncle Jerry's informing Uncle Jerry's of Cool Gear's rights in its CEREAL ON THE GO mark and the Cool Gear Trade Dress and demanding Uncle Jerry's cease and desist use of such trade dress and the name ON-THE-GO CEREAL CUP. See attached **Exhibit B**.

23. Uncle Jerry's responded on April 5, 2013. See attached **Exhibit C**.

24. Upon information and belief, Uncle Jerry's use of the name ON-THE-GO CEREAL CUP in connection with Uncle Jerry's On-the-Go Container is willful and intentional.

25. Upon information and belief, Uncle Jerry's use of trade dress that is substantially visually identical to the Cool Gear Trade Dress in connection with Uncle Jerry's On-the-Go Container is willful and intentional.

26. Uncle Jerry's use of the name ON-THE-GO CEREAL CUP in connection with Uncle Jerry's On-the-Go Container is without Cool Gear's license, authorization, or permission.

27. Uncle Jerry's use of the trade dress for the On-the-Go Container is without Cool Gear's license, authorization, or permission.

28. Cool Gear's customers, and the public in general, are likely to be confused, mistaken or deceived as to the source or sponsorship of Uncle Jerry's On-the-Go Container using the trade dress complained of herein and offered for sale under the mark ON-THE-GO CEREAL CUP, and as to whether the Uncle Jerry's On-the-Go Container using such trade dress and sold under such mark is produced by, emanates or is under license from or is otherwise affiliated with Cool Gear, to the damage and detriment of Cool Gear and its reputation.

FIRST CLAIM
UNFAIR COMPETITION IN THE NATURE
OF TRADEMARK INFRINGEMENT

29. Cool Gear repeats the allegations of paragraphs 1-28 as if fully set forth herein.

30. Cool Gear avers that it will be damaged by the continued use by Uncle Jerry's of the name ON-THE-GO CEREAL CUP and that such name is confusingly similar to Cool Gear's CEREAL ON THE GO mark and that Uncle Jerry's ON-THE-GO CEREAL CUP name is used in connection with Uncle Jerry's On-The-Go Container which is nearly identical to Cool Gear's CEREAL ON THE GO Container.

31. Uncle Jerry's use of the ON-THE-GO CEREAL CUP name in connection with its On-The-Go Container is causing and is likely to cause confusion of the relevant trade and public and irreparable injury to Cool Gear.

32. Uncle Jerry's use in commerce of ON-THE-GO CEREAL CUP name complained of herein is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Uncle Jerry's with Cool Gear in violation of 15 U.S.C. §1125(a)(1).

33. Uncle Jerry's use in commerce of ON-THE-GO CEREAL CUP name complained of herein is likely to cause confusion, or to cause mistake, or to deceive as to the origin, sponsorship or approval of Uncle Jerry's On-the-Go Cereal Cup by Cool Gear in violation of 15 U.S.C. §1125(a)(1).

34. Uncle Jerry's use of ON-THE-GO CEREAL CUP name, complained of herein, for Uncle Jerry's On-the-Go Container is likely to cause damage and irreparable injury to Cool Gear and its goodwill in its CEREAL ON THE GO mark.

35. Cool Gear has no adequate remedy at law.

SECOND CLAIM
UNFAIR COMPETITION IN THE NATURE
OF TRADE DRESS INFRINGEMENT

36. Cool Gear repeats the allegations of paragraphs 1-35 as if fully set forth herein.

37. Uncle Jerry's On-the-Go Container trade dress is compromised of essentially the same design elements as the Cool Gear Trade Dress as used for the Cool Gear CEREAL ON THE GO Container. Uncle Jerry's On-the-Go Container has essentially the same truncated conical configuration with a slightly flared waist, as the Cool Gear CEREAL ON THE GO Container.

38. The minor differences in appearance between Uncle Jerry's trade dress, complained of herein, and the Cool Gear Trade Dress as used for the Cool Gear CEREAL ON THE GO Container, are not readily apparent and would be easily overlooked.

39. The trade dress of Uncle Jerry's On-the-Go Container so resembles the Cool Gear Trade Dress for the Cool Gear CEREAL ON THE GO Container as to be likely to cause confusion, mistake, or to deceive purchasers.

40. Uncle Jerry's use in commerce of the trade dress complained of herein is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Uncle Jerry's with Cool Gear in violation of 15 U.S.C. §1125(a)(1).

41. Uncle Jerry's use in commerce of the trade dress complained of herein is likely to cause confusion, or to cause mistake, or to deceive as to the origin, sponsorship or approval of Uncle Jerry's On-the-Go Cereal Cup by Cool Gear in violation of 15 U.S.C. §1125(a)(1).

42. Uncle Jerry's use of the trade dress, complained of herein, for Uncle Jerry's On-the-Go Container is likely to cause damage and irreparable injury to Cool Gear and its goodwill in the Cool Gear Trade Dress.

43. Cool Gear has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Cool Gear International, LLC respectfully requests that this Court:

1. Enter judgment in its favor and against Defendant on the Complaint;
2. Permanently enjoin Defendant, its officers, agents, employees and all other persons in active concert or participation with Defendant from:
 - a. use of the ON-THE-GO CEREAL CUP as a mark or name or component of a mark or name or domain name;
 - b. use of the trade dress for the On-the-Go Cereal Cup depicted in **Exhibit A** and any other trade dress which simulates the Cool Gear Trade Dress, also depicted in **Exhibit A**;
 - c. engaging in any other conduct that is likely to cause confusion, mistake or deception as to the source, sponsorship or affiliation of its products with the Plaintiff, and the Plaintiff's CEREAL ON THE GO mark and the Plaintiffs' Cool Gear Trade Dress.
3. Order an accounting against Defendant for all profits received from the sale of goods, directly or indirectly, in connection with, advertised, or promoted in any manner, by use of the trade dress complained of herein in the United States;
4. Award Plaintiff its attorneys' fees, costs, and disbursements pursuant to 15 U.S.C. § 1117; and
5. Grant such further relief as this Court deems just and appropriate.

Respectfully submitted,

ECKERT SEAMANS CHERIN & MELLOTT, LLC

Dated: April 15, 2013

By: /s/ William J. Bigham

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CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 11.2

The undersigned attorney for Plaintiff Cool Gear International, LLC hereby certifies, pursuant to Local Civil Rule 11.2, to the best of his knowledge, that the matter in controversy is not the subject of any other action pending in any court or agency or any arbitration.

Dated: April 15, 2013

By: /s/ William J. Bigham
William J. Bigham, Esq.
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CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 201.1

The undersigned attorney for Plaintiff Cool Gear International, LLC hereby certifies, pursuant to Local Civil Rule 201.1, that this action is not appropriate for compulsory arbitration because Plaintiff Cool Gear International, LLC seeks declaratory relief in addition to monetary damages.

Dated: April 15, 2013

By: /s/ William J. Bigham
William J. Bigham, Esq.
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EXHIBIT A



Plaintiff Cool Gear International, LLC's CEREAL ON THE GO container



Defendant Uncle Jerry's T's of NJ, Inc. On-the-Go container

EXHIBIT B



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Roberta Jacobs-Meadway
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rjacobsmeadway@eckertseamans.com

March 12, 2013

Via U.S. Mail and electronic mail

Uncle Jerry's
Peter Schneider
265 Willow Brook Road
Unit 1
Freehold, NJ 07728
uncjerryts@aol.com

Re: On-the-Go Cereal Cup
Our file: 297816-00058

Dear Mr. Schneider:

This office represents Cool Gear International LLC (Cool Gear) in connection with certain trademark and unfair competition matters.

It has come to Cool Gear's attention that the 2012-2013 Uncle Jerry's T'S catalogue includes an item, designated P860 (copy attached) offered under the name: On-the-Go Cereal Cup.

Cool Gear has since at least as early as May 12, 2005 used CEREAL ON THE GO as a trademark for plastic food storage containers having a distinctive truncated conical configuration with a slightly flared waist. The Cool Gear CEREAL ON THE GO containers may be seen at the website: www.coolgearinc.com/snack_container_083.html.

Cool Gear's sales and promotion of its CEREAL ON THE GO containers have been commercially significant, continuous, and substantially exclusive.

Please appreciate that the distinctive trade dress of the cereal container and the associated CEREAL ON THE GO mark are very valuable assets of Cool Gear, and it is the policy and practice of Cool Gear to protect its trade dress and trademark rights.



Roberta Jacobs-Meadway
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The product configuration of Item P860 and the use of the name "On-the-Go" for the cereal cup product are each likely to cause confusion as to the source or sponsorship of the product or as to the affiliation of its supplier with Cool Gear and its distinctive CEREAL ON THE GO containers, granted the essentially identical configuration of the products and close similarity between the marks. Such use accordingly is an infringement of Cool Gear's trade dress rights in its product configuration and also of Cool Gear's trademark rights.

Please appreciate also that while Cool Gear is supportive of the type of business conducted under the Uncle Jerry's name and mark, it must insist that

1. Uncle Jerry's T's without delay cease offering for sale any cereal container having the same configuration as the Cool Gear CEREAL ON THE GO container and cease use of the name "On-the-Go" in connection with cereal containers;
2. Uncle Jerry's T's advise us promptly of the contact information for the supplier of the On-the-Go Cereal Cup containers shown in the catalogue; and
3. Uncle Jerry's T's advise us promptly of the contact information for each customer who has purchased the On-the-Go Cereal Cup containers.

We ask that Uncle Jerry's T's comply with these requests by the close of business on March 22, 2013.

We do wish to accomplish an amicable resolution; but any offer of compromise is without prejudice to any demand or claim that may be made in the event that further action is required by Cool Gear to protect its trade dress and trademark rights from the acts of Uncle Jerry's T's complained of herein.

Sincerely,


Roberta Jacobs-Meadway

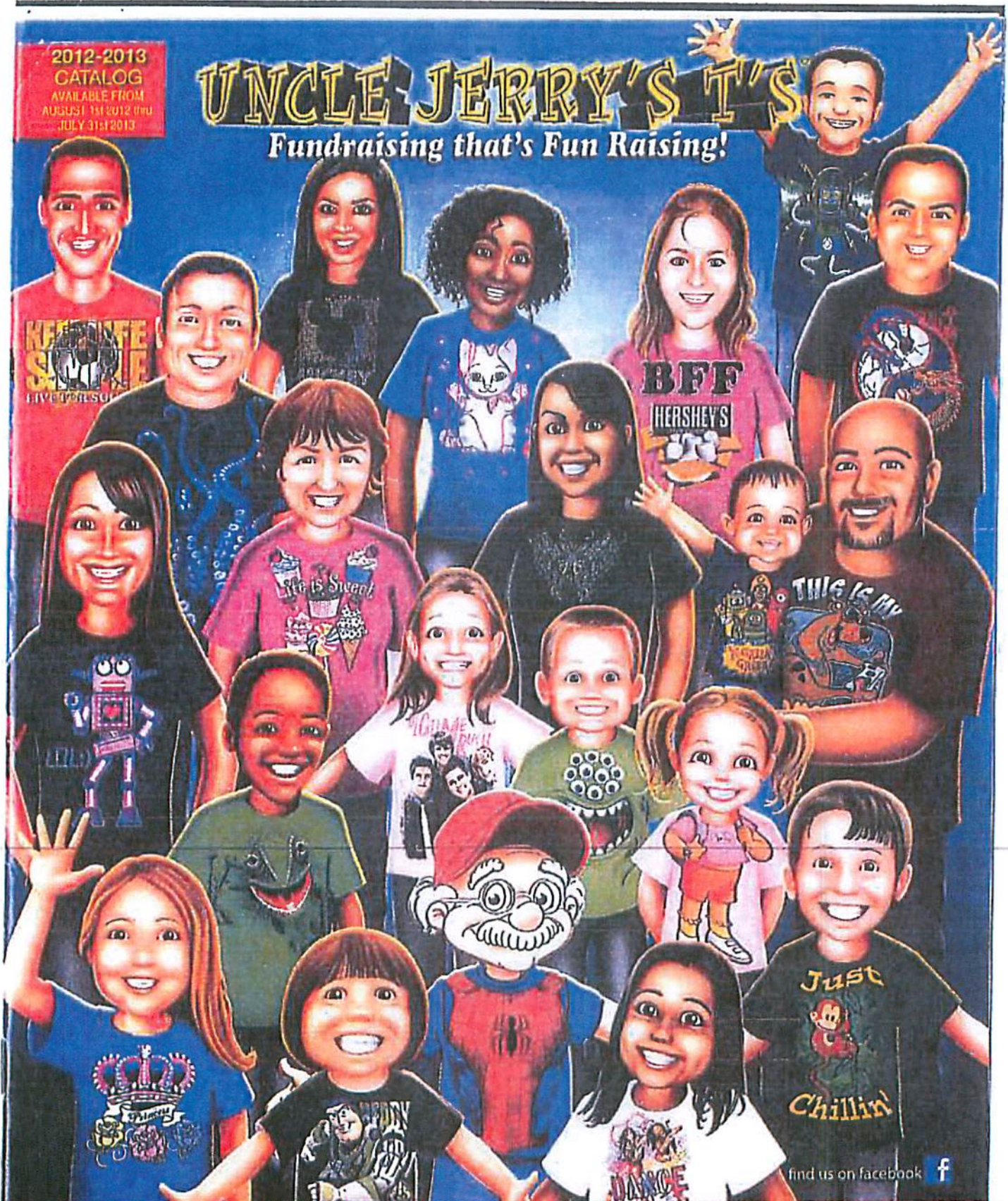
RJM


cc: Donna Roth (via electronic mail)

2012-2013 CATALOG
AVAILABLE FROM
AUGUST 1st 2012 thru
JULY 31st 2013

UNCLE JERRY'S T'S

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H750

Multi-Purpose Stainless Steel 5 in 1 Grill Tool

The most essential barbecuing and grilling tool in ONE – a spatula, tongs, meat tenderizer, fork, and a serrated edge for cutting. Stainless steel with wooden handle. 13-3/4" L. \$12.00



X756

Protect Your Oven Liner

Never clean the bottom of your oven again! Splatters and spillovers clean up with ease. Designed to fit a standard oven and can be trimmed to fit smaller ovens. 23" x 16". \$10.00

Cracker & Cookie Containers

Set of 2. Use these handy containers to keep cookies and crackers fresh and not stale. Great for traveling! Holds one package of crackers/cookies. Dishwasher safe. 9" H \$8.00



P811

On-the-Go Cereal Cup

Enjoy cereal on the go! Freeze the bottom half of our cereal container before you leave home to keep milk cool. Cereal stays dry and fresh in the top compartment until it's time to eat. Includes foldable spoon. 6-1/2" H. \$8.00

6-1/2" H.

\$8.00

P860



H751

Hanging Jewelry Organizer

Organize, store and protect all your favorite jewelry pieces. This versatile closet organizer is double sided and offers 36 vinyl storage pockets on each side. 14-3/4" W x 33" H. \$10.00

Silicone Rainbow Whisk

Colorful nonstick silicone adds fun to your kitchen. Great to use with nonstick cookware. Dishwasher safe. 10" L. \$8.00



P854

Live Laugh Love Glass Photo Coasters, Set of 4

Display all your favorite photos. Uniquely designed with heat protected glass and non-slip backing. Each coaster displays a special message. Set of 4. 3-1/4" x 3-1/4" \$10.00



H753

EXHIBIT C



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April 5, 2013

BY EMAIL ONLY

Ms. Roberta Jacobs-Meadway
Eckert Seamans Cherin & Mellott, LLC
Two Liberty Place
50 South 16th Street, 22nd Floor
Philadelphia, PA 19102

Re: Uncle Jerry's Tees
On-the-Go Cereal Cup
Our Ref: 70086/G1000
Your Ref: 297816-00058

Dear Ms. Jacobs-Meadway:

This is in further response to your March 12, 2013 letter in which you raise trademark and trade dress infringement issues with regard to Uncle Jerry's On-the-Go Cereal Cup (Catalogue No. P860) vis-à-vis Cool Gear International LLC's CEREAL ON THE GO plastic food storage containers. We'll address each issue in turn.

Trademark

We have considered your claims regarding trademark infringement and we disagree that there is any likelihood of confusion between your client's mark CEREAL ON THE GO and our client's use of the phrase "On-the-Go Cereal Cup."

As an initial matter, Cool Gear's mark, CEREAL ON THE GO, is relatively weak. The phrase "On-the-Go" is, to quote your client in its pending U.S. trademark application No. 85/358,269, "so widely used that the public will look to other elements to distinguish between [Cool Gear's] mark" and other marks. The "other element" in this case would be the word "CEREAL", yet Cool Gear has disclaimed the use of this descriptive word in its pending application, so even the allegedly distinguishing aspect of Cool Gear's mark is weak, rendering the entire mark relatively weak.

Secondly, our client is not in the same market as Cool Gear. Uncle Jerry's Tees does not sell its products wholesale to large retailers such as Target, Kohl's and Wal-Mart. It is extremely unlikely that consumers would encounter Cool Gear's product and Uncle Jerry's Tees product in the same retail setting.

Third, our research indicates that there are other third party users of the phrase "Cereal on the go" in a generic sense, suggesting that no one entity has proprietary rights to this phrase.

Even assuming Cool Gear has some proprietary right in the mark CEREAL ON THE GO,



MILLER, MATTHIAS & HULL LLP

April 5, 2013
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failure to enforce one's trademark rights can result in the loss of those rights. We ask that you provide evidence of Cool Gear's trademark rights, including use of the trademark since May 12, 2005, and your client's efforts to police and enforce those rights.

In view of these considerations, we believe that Cool Gear has no proprietary right in the phrase "On the Go" and, even if they do, there is no likelihood of confusion between the parties' respective marks. Accordingly, our client has the legal right to continue using the phrase "On-the-Go" in its advertising to describe its cereal cups.

Trade Dress

With regard to trade dress infringement, we question whether your client's product has acquired the necessary secondary meaning to prevail in a trade dress infringement action. We also are not aware of any instances of confusion between our clients' respective products. If you have such evidence we ask that you provide it so we can re-evaluate this matter.

We further note that there appear to be third party users of the same or similarly shaped containers, again suggesting that the appearance of your client's product is not unique.

Summary

Based on the information we now have it is our opinion that Uncle Jerry's Tees does not infringe any trademark or trade dress rights Cool Gear may have. After hearing back from you regarding the information requested above, we will of course re-evaluate our opinion and consider what action, if any, is warranted, including whether to remove this item from future catalogues.

Sincerely,

/H. Jack Fassnacht/

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